JAN 5 2001

No. 99-1978

Supreme Court, U.S.
FILED
JAN 5 2001
CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE AMICUS CURIAE FEDERAL JUDGES ASSOCIATION IN SUPPORT OF RESPONDENTS

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No. 99-1978

In the Supreme Court of the United States

United States of America, Petitioner

v.

Judge Terry J. Hatter, Jr., et al., Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL JUDGES ASSOCIATION AS AMICUS CURIAE

This brief is submitted on behalf of the Federal Judges Association as *Amicus Curiae* in this cause. The filing of this Brief was authorized by consent under Supreme Court Rule 37.3(a).[1]

THE INTEREST OF THE AMICUS CURIAE

The Federal Judges Association ("FJA") is an independent, voluntary association of judges of the United States who hold their office under Article III of the Constitution of the United States. The purpose of the Association is to seek the highest quality of justice for the

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[1] This brief was authored by FJA counsel only. No person or entity, other than FJA, made a monetary contribution to the preparation or submission of this brief. (Sup. Ct. R. 37.6).

people of the United States. In pursuing this purpose, FJA is authorized to do all things reasonable and necessary, including:

- preserve and protect the ability of the Federal Judiciary to attract and retain the best qualified men and women for judicial service; and

- preserve and protect the independence of the Federal Judiciary from intrusion, intimidation, coercion or domination from any source.

The filing of this brief was authorized by unanimous vote of the Executive Committee of the Association.

SUMMARY OF ARGUMENT

Prior to the adoption of the "Social Security Amendments" of 1982 and 1983,[2] Article III judges were not required to make contributions to the Social Security system for Medicare Hospital Insurance ("HI") or Old Age & Survivors Disability Insurance ("OASDI"). With the adoption of those amendments, effective January 1, 1983, and January 1, 1984, respectively, judges' salaries were directly taxed and thereby reduced each month for contributions into these programs. The legislative purpose behind the mandatory enrollment of judges was to help support the "system," which was financially threatened. The plaintiff-judges neither needed nor wanted the "benefits" of participation in the program. The judges, therefore, claimed that their compensation was unconstitutionally diminished by these Acts. The Court of Appeals agreed.

It is obvious that a judge's compensation may be reduced in violation of the Compensation Clause through taxation. The dispute here concerns the circumstances in which the taxation of a judge's salary causes a constitutional violation. In Evans v. Gore, 253 U.S. 245 (1920), the Court held that a judge's salary may not be taxed at all. In a subsequent case, O'Malley v. Woodrough, 307 U.S. 277 (1939), the Court limited Evans to proscribe only taxes not in effect when the judge took office. Evans, as modified by O'Malley, holds that no new tax may be imposed on the salary of a sitting judge. In this case, the government concedes that if Evans is controlling, the plaintiffs here should prevail. The government also concedes that Evans has never been overruled by this Court. It argues, however, that Evans has been undermined by two subsequent cases, O'Malley and United States v. Will, 449 U.S. 200 (1980), and should now be overruled.

Alternatively, the government contends that any violation of the anti-diminution provisions of Article III was cured (and the judge's compensation claim satisfied) when Congress subsequently approved increases in judges' pay in amounts greater than the amount wrongfully withheld. (Govt. Bf., pp. 14, 17, 40-43).

For the reasons set out in this brief, FJA, as *Amicus*, respectfully urges this Court to affirm the decision of the Court of Appeals.

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[2] Withholding of the Hospital Insurance portion of the Social Security tax (*i.e.*, Medicare) from the salaries of Article III judges was accomplished pursuant to the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 278(a), 96 Stat. 324, 559 (1982). Withholding of the Old Age and Survivors Disability Insurance portion of the tax was accomplished pursuant to the Social Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1), (b)(1) & (d), 97 Stat. 65, 68-69 (1983).

1. Recognizing that Evans has never been overruled, the Court of Appeals was duty bound to follow it. The court correctly did so in its 1995 decision, Hatter v. United States, 64 F.3d 647 (Fed. Cir. 1995) ("Hatter IV"). The Court of Appeals did not rely solely on Evans. It also relied on the historical purposes of the Compensation Clause. This Court affirmed, Hatter v. United States, 519 U.S. 801 (1996) ("Hatter V").

2. Even if the Court disagrees with the holding in Evans, plaintiffs should prevail because the taxes here were not taxes shared by all other citizens in like circumstances. See O'Malley, 307 U.S. at 282; Evans, 253 U.S. at 265 (Holmes, J., dissenting). The rationale of O'Malley was, first, that the imposition of a tax on the general population eliminates the risk that the Legislative and Executive Branches will use the tax as a means to punish judges; and, second, that a judge is no worse off as a result of such a tax than the judge would be if he or she held some other public office or position in the private sector. This rationale is not applicable here. Not only was the tax not applied uniformly to all citizens, it was not even applied uniformly among government employees. The government concedes and its authorities acknowledge that a tax or other statute applied to judges in a discriminatory manner can violate the Compensation Clause. (Govt. Bf., p. 37 n. 27).

3. *Amicus* respectfully urges the Court, should it determine that Evans should be overruled, to reaffirm and restate the principles enunciated in Evans regarding the interpretation and application of the Compensation Clause. Those principles have never been criticized and continue to define the scope and meaning of the Clause.

4. As to the government's alternative argument, FJA suggests that where a violation of the Compensation

Clause occurs, the violation is not remedied by an unrelated general increase in judges' pay. Rather, as with any other constitutional violation based on money wrongfully withheld or taken, the constitution requires that the party injured by the violation be made whole. Here, the proper measure of damages is the difference between what the judges actually received and what they would have received if the violations had not occurred. Contrary to the assertions of the government, United States v. Will does not support its argument that a subsequent increase cures any violation. To the contrary, when damages were computed in Will, judges were repaid all that was withheld as a result of the unconstitutional acts complained of there.

ARGUMENT

I. THE IMPOSITION OF SOCIAL SECURITY TAXES ON THE SALARIES OF ARTICLE III JUDGES DIMINISHED JUDGES' COMPENSATION IN VIOLATION OF THE COMPENSATION CLAUSE.

In its 200 year history, the Court has been called upon to interpret the Compensation Clause in only a handful of cases, the last being 20 years ago. United States v. Will, 449 U.S. 200 (1980). In this appeal the government asks this Court to overrule the Court's first, and in some respects, its most important, opinion interpreting and applying the Clause. The government presumes in its argument that if Evans v. Gore, 253 U.S. 245 (1920) is overruled it will win its case. The government's presumption is not valid. Although the Court of Appeals correctly found Evans as controlling precedent, it did not rely solely on that decision. It measured its ruling against the historical purposes of the Compensation Clause and it applied well-settled principles consistently announced by the Court. The application of

these principles supports affirmance. Indeed, as shown below, the "tax" at issue here does not pass muster, even under the test proposed by the government.

FJA respectfully submits that the implications of this case go well beyond the damage claims of these plaintiff judges. The principles expressed by the Court in Evans are sound and have been cited by the Court and other courts on many occasions. Such important precedent should not be overruled.

FJA's principal concern in this case is that the Court continues to interpret and apply the Compensation Clause consistent with its purposes as expressed by the Founders and the earlier decisions of the Court, including Evans.

A. The History Of The Compensation Clause And The Decisions Of The Court Support A Broad Reading Of The Clause To Accomplish Its Purposes.

1. The Historical Background of the Compensation Clause.

The Compensation Clause, Article III, Section 1, of the Constitution of the United States directs that judges of the United States receive "a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST., art. III, § 1.

The purpose of Article III, Section 1 was to perfect the basic plan of Articles I, II and III of the Constitution to make each branch of government separate from and independent of the others. The Framers recognized that nothing less than tyranny would result if one branch could control or dominate another, particularly the Judiciary. See

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58 (1982) (quoting The Federalist No. 47 (James Madison)).

The Founders were also aware from experience that the Judiciary would not be independent if the Executive or Legislative Branch could control their tenure or compensation. In the Declaration of Independence, the colonists criticized the King of England for having "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." United States v. Will, 449 U.S. 200, 219 (1980) (quoting DECLARATION OF INDEPENDENCE (U.S. 1776)).

The Framers were concerned about the inherently defenseless status of the Judicial Branch and its consequent need for special protection if it was to remain independent. As Alexander Hamilton stated in The Federalist No. 78:

> [T]he judiciary is beyond comparison the weakest of the three departments . . . it can never attack with success either of the other two; and . . . all possible care is requisite to enable it to defend itself against their attacks.

The Federalist No. 78, at 465-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The Founders provided this essential special protection through two related provisions: appointment for life (the Tenure Clause) and the promise of a compensation protected against diminution (the Compensation Clause). They recognized, too, that life tenure was meaningless without the guarantee of an undiminished compensation. As Hamilton explained in The Federalist No. 79:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support .... In the general course of human nature, a *power over a man's subsistence amounts to a power over his will.*

The Federalist No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original). See also id. at 473-74.

Madison gave a similar account of the Convention's thinking (and his own), making it clear that all "emoluments" of the office, not just salary, were to be protected.

> It is equally evident that the members of each department should be *as little dependent as possible* on those of the others *for the emoluments annexed to* their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). The Founders therefore resolved "to put it out of the power [of the Legislative Branch] to change the condition of the individual [judge] for the worse." The Federalist No. 79, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Article III, Section 1 was designed to accomplish these objectives.

2. Decisions of the Court.

At every opportunity the Court has interpreted the Compensation Clause consistent with the Founders' objectives.

As the Court said in United States v. Will, 449 U.S. 200, 218 (1980), the Clause is the cornerstone of our doctrine of judicial independence, designed to protect the rights of all citizens "to have claims decided by judges who are free from potential domination by other branches of government." The Court in Will also recognized that the Clause serves a related purpose: to assure a prospective judge who is contemplating the abandonment of a more lucrative private practice that the judicial compensation will not diminish. This assurance serves "to attract able lawyers to the bench and thereby enhances the quality of justice." Id. at 220-21 (citing Evans v. Gore, 253 U.S. 245, 253 (1920) and 1 J. Kent, Commentaries on American Law 276 (1826)).

The Court's first opinion in a Compensation Clause case came in Evans v. Gore. The Court used this historic opportunity to publish a comprehensive opinion on the principles and purposes of the Clause, no doubt aware that its pronouncements would govern the scope and application of the Clause for generations to come. The Court of Appeals in this case correctly acknowledged Evans as a "seminal" opinion (Hatter v. United States, 185 F.3d 1356, 1359 (Fed. Cir. 1999) ("Hatter VII")), because the principles enunciated therein regarding the interpretation and application of the Clause continue to define its scope and meaning.

In Evans, the Court held that Article III, Section 1 prevented Congress from imposing an income tax on the salary of a judge, despite the fact that the tax applied uniformly to all citizens. In reaching its decision, the Evans

Court reviewed the historical authorities previously discussed and, drawing heavily from the writings of Hamilton and Madison, made clear that the Clause must be interpreted, not narrowly, but broadly, in a way that achieves its objectives.

The Court emphasized that without a truly independent Judiciary, the concept of checks and balances, which is fundamental to our system of government, would be unattainable. It also acknowledged the Founders' concern that the Judicial Branch not be dominated by the others, particularly the Legislative Branch:

> The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, – the legislative, the executive, and the judicial, – in separate departments, each relatively independent of the others; and it was recognized that without this independence – if it was not made both real and enduring – the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

Evans, 253 U.S. at 249.

The Court went on to relate the Founders' recognition that true independence of the judiciary required both life tenure and a guarantee of undiminished compensation.

> Can there be any doubt that the two things thus coupled in place – the clause in respect to tenure during good behavior and that in respect of an undiminishable compensation – were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task and with the imperative need for its impartial and fearless performance?

Id. at 252.

The Court then explained that the Founders' objectives in adopting the Compensation Clause were not to benefit the judges, but,

> like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guarantee's limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

Id. at 253.

With these objectives in mind, the Court opined that the Clause is to be construed broadly to accomplish its objectives: "[I]t is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principles on which it proceeds." Id. at 253-54.

Drawing again on the writings of Hamilton, the Court also cautioned that Article III may be violated by direct or indirect actions of the other branches:

> Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle.

Id. at 254.

The principles of Evans, derived by that Court from the most authoritative sources, particularly the writings of Hamilton and Madison, may be summed up concisely.

1. A truly independent judiciary is the cornerstone of our constitutional democracy.

2. Life tenure and the guarantee of undiminished compensation are essential to judicial independence. They are interdependent. Without the assurance regarding compensation, life tenure would be meaningless.

3. In matters relating to compensation, the Constitution has placed judges in a very special and protected class among federal officers and employees. This special protection was conferred, not for the benefit of judges, but because the survival of an independent judiciary depends upon it.

4. Consistent with these constitutional principles, the Compensation Clause is to be read broadly, "not restrictively," recognizing that it is designed to strictly limit, "in the public interest," any action by the other branches which "directly or indirectly takes from a judge compensation provided by law," i.e., any act of Congress that might have a negative impact on compensation is strictly scrutinized.

Applying these principles the Court concluded that a judge's salary could not be taxed.

Justice Holmes dissented.[3] But his dissent did not criticize the fundamental principles expressed by the majority. He disagreed only with the application of these principles to the tax at issue. He expressed a view that judges should be subject to the tax, which he described as the "ordinary duties of a citizen." Evans, 253 U.S. at 265 (Holmes, J., dissenting). According to Justice Holmes, a judge's salary could be taxed in the same way that his house or personal investments may be taxed. He distinguished that situation from the Constitution's concern with "preventing attempts to deal with a *judge's salary as such*." Id. (emphasis added).

Subsequent decisions of the Court demonstrate that Justice Holmes' disagreement with the majority related to the result only. The principles specified above were consistently followed in subsequent decisions.

In Miles v. Graham, 268 U.S. 501 (1925), the Court applied the holding of Evans to the case of a judge who took office *after* the income tax was enacted. The Court held that the judge's income could not be taxed. The Court repeated

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[3] Justice Brandeis joined in the dissent.

In Miles v. Graham, 268 U.S. 501 (1925), the Court applied the holding of Evans to the case of a judge who took office *after* the income tax was enacted. The Court held that the judge's income could not be taxed. The Court repeated many of the statements and principles concerning Article III quoted above. It is interesting to note that Justice Holmes, the author of the dissent in Evans, was a member of the Court in Miles and did not dissent. Justice Brandeis noted his dissent but wrote no opinion.

The Court next addressed the scope of Article III when the economic crisis of the 1930's gave rise to two other important cases, O'Donoghue v. United States, 289 U.S. 516 (1933), and Booth v. United States, 291 U.S. 339 (1934). During the Great Depression, Congress found it necessary to reduce the salaries of all government employees, including those judges who were not protected by Article III. Judge O'Donoghue served on the District of Columbia Court and the issue in his case was whether that court was an Article III court or an Article I court. The Court held that the District of Columbia Court was an Article III court and that therefore Judge O'Donoghue was entitled to life tenure and compensation protected from diminution by the Compensation Clause.

O'Donoghue is relevant here because it reaffirmed the principles of judicial independence laid down in Evans. Indeed, every statement from Evans quoted above was quoted with approval there. Every principle enumerated above was endorsed there, and described as "time honored and never discredited." O'Donoghue, 289 U.S. at 533. The Court not only adopted the principles of Evans, it expressed the view that the importance of their enforcement imposed upon every federal judge, "a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation." Id. This duty is imposed not

for the purpose of protecting the financial well being or "private advantage" of the individual judge, "but as a continuing guaranty of an independent judicial administration for the benefit of the whole people." Id.

O'Donoghue also emphasized that, in interpreting a statute that implicates Article III, a court must "first consider the great underlying purposes which the framers of the Constitution had in mind . . . " in adopting the Compensation Clause. Id. at 529-30. In other words, the challenged statute must be read strictly to avoid any encroachment on judicial independence.

In Booth v. United States, 291 U.S. 339 (1934), the Court again strictly construed a statute that had the effect of reducing judges' pay and held that a retired federal judge retained the protections of Article III and his compensation could not be diminished, despite the fact that salaries of most other federal employees were reduced. Notably, there was no discrimination against judges vis-à-vis other federal employees in O'Donoghue or Booth. See also United States v. Will, 449 U.S. 200, 226 (1980), discussed infra, pp. 18-19.

The Court next visited Article III in O'Malley v. Woodrough, 307 U.S. 277 (1939). In O'Malley, the Court was called upon to consider the income tax question again. Judge Woodrough, like Judge Graham in the Miles case, had been appointed to his position after the effective date of the income tax law. The Court overruled the holding in Miles (id. at 282-83), but refused the urging of the Solicitor General to also overrule Evans.

The O'Malley opinion cited with approval an opinion of Attorney General Palmer, 31 Op. Att'y. Gen. 475 (1919)(cited at 307 U.S. 280 n.3). In opining that a general, non-discriminatory tax imposed on net income was

constitutional, the Attorney General acknowledged that the Compensation Clause "would prevent the levying upon [judicial] salaries of a special tax not applicable to others enjoying like incomes." 31 Op. Att'y. Gen. at 484. Mr. Palmer, like Justice Holmes, also pointed out that the tax was on net income from all sources and was not imposed "on their salaries as such" or in a "discriminative way." Id. at 486-87.

The Court's opinion in O'Malley runs less than five full pages in the United States Reports (307 U.S. at 278-83). It does not criticize the general principles of Evans. It merely disagrees with their application to a general tax on the net income of a judge appointed prior to the imposition of a tax. Like Justice Holmes' dissenting opinion in Evans, the majority in O'Malley saw the *holding* of Evans as being far stricter than what is warranted to accomplish the purposes of Article III. The O'Malley Court expressed the view that the application of a tax on net income, *uniformly applied to all citizens*, would not bring about the evils that the Compensation Clause was designed to prevent.

The next and most recent Compensation Clause case decided by the Court was United States v. Will, 449 U.S. 200 (1980). The claims in Will did not involve taxes. Will involved the interpretation and application of a statute that provided the mechanism for calculating and paying cost-of-living adjustments ("COLAs") to judges and other high-ranking government officers. The Court concluded that the statute at issue did not establish a right to a COLA, but only provided a formula to compute the COLA, should Congress determine that one should be paid. Will is relevant here only because the government claims a comment by the Court there further undermines Evans. (Govt. Bf., pp. 21-22). But the Will Court's reference to Evans focused only on attempts by counsel for the judges to read that decision too broadly by

attributing to Evans a rule that Article III imposed an "absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges." Will, 449 U.S. at 227. Significantly, the Will Court did not overrule Evans. To the contrary, it cited Evans with approval for a number of the principles recited above. See Will, 449 U.S. at 217, 221, 226 n.30.

The Will Court also discussed O'Malley and explained the difference between a tax or burden that affects all citizens, and a non-discriminatory tax imposed on a smaller universe such as a group of federal employees. The government had relied upon O'Malley to support an argument that because the adjustments were withheld from all other Executive Level positions, there was no discrimination and that a non-discriminatory reduction in judges' pay did not violate the Compensation Clause. The Court rejected this argument, pointing out that in O'Malley the Court was dealing with a tax imposed on "*all taxpayers*." Will, 449 U.S. at 226 (emphasis added). The Court explained that the inclusion of a group of federal employees in the reduction did not bring the case within O'Malley's rationale:

> The Government contends that Congress could reduce compensation as long as it did not "discriminate" against judges, as such, during the process. That the "freeze" applied to various officials in the Legislative and the Executive Branches, as well as judges, does not save the statute, however . . . The inclusion in the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges' salaries from the clear mandate of that

> Clause; the Constitution makes no exceptions for "nondiscriminatory" reductions.

Id. This statement, of course, fits squarely with the holdings in O'Donoghue and Booth and lays to rest any argument here that judges' pay may be subject to a special tax simply because the tax is imposed on some other federal employees.

B. The Court Of Appeals Was Correct To Follow Evans.

Evans has never been overruled. The Court of Appeals was duty-bound to follow it. The Court correctly did so in its 1995 decision, Hatter IV, 64 F.3d 647 (Fed. Cir. 1995). Even had the Court of Appeals agreed with the government that O'Malley or Will had so weakened Evans that it would ultimately be overruled, it was not for that court to anticipate such action by this Court. The Court has admonished against such speculation and has directed the lower courts to follow any Supreme Court decision that directly controls, leaving to the Court "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); accord, e.g., Agostini v. Felton, 521 U.S. 203, 237 (1997).

Moreover, the Court of Appeals did not rely solely on the *holding* of Evans. It looked to the deliberations of the Founders at the Convention. Hatter IV, 64 F.3d at 651. It looked to the writings of Hamilton and Madison. Id. It looked to the opinions of the courts, particularly the Court. Id. at 650-52. Its reasoning and decision that the taxes at issue violated Article III are soundly based on all of those sources.

FJA respectfully submits that even if this Court disagrees with the holding of Evans, that case should not be

If this Court disagrees and determines that Evans should be overruled, *Amicus* urges the Court to preserve the principles enunciated in Evans, which have never been criticized, modified or overruled. Indeed, as noted above, subsequent decisions of the Court have adopted and reaffirmed the principles of Evans.

C. The Decision Of The Court Of Appeals Should Be Affirmed Because The Social Security Taxes Imposed On Judges' Salaries Were Not Uniformly Applied To All Americans And Were Discriminatory As To Judges.

1. The Social Security Taxes Here Were Not Uniformly Applied to all Citizens.

Even under the government's reading, there is a constitutional violation under the Compensation Clause where the tax imposed on judges is not universally applied to all citizens. In O'Malley, the Court based its reasoning upon the fact that the income tax at issue was generally applied to all citizens. The Court accepted the government's position that a tax laid generally on all taxpayers in like circumstances was not an unconstitutional diminution of judges' salaries, and stated that "[t]o subject them to a general tax is merely to recognize that judges are also citizens. . . ." 307 U.S. at 282. This position was set forth earlier by Justice Holmes in his dissent in Evans, where he commented that "[t]o require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge." 253 U.S. at 265.

Clause itself." (Govt. Bf., p. 37 n.27). Attorney General Palmer, in his 1919 opinion concluding that the Revenue Act of 1918 did not violate the Compensation Clause, pointed out that the Act did not levy a tax upon judges' incomes "in any discriminative way." 31 Op. Att'y. Gen. at 487. Here, however, Article III judges were the *only* federal employees not given the ability to avoid the negative impact of the OASDI tax. The tax was discriminatory and therefore unconstitutional.

II. HAVING SUFFERED DIMINUTION IN THEIR COMPENSATION, THE PLAINTIFF-JUDGES MUST BE MADE WHOLE.

The government's contention that subsequent pay adjustments compensate for or "cure" any unconstitutional diminution in compensation makes no sense. The Court of Appeals correctly recognized that the plaintiffs would be forced, under the government's theory,

> to pay, from their own pockets and out of their own salaries, including generally-granted increases, the damages owed to them by the government. . . . It would be inequitable to charge these judges with the duty to pay their own damages from their own salaries, out of salary increases that Congress thereafter granted to all judges, increases unrelated to that liability.

Hatter VII, 185 F.3d at 1362. The Court thus recognized that the Social Security taxes that plaintiffs were required to pay were the measure of the monetary damages suffered. The fact that, for wholly unrelated reasons, judges and other federal employees subsequently received salary increases is irrelevant.

Once a constitutional violation has been established, the victim is entitled to recover damages suffered as a result of the violation. The concept is a simple one. The government must restore what has been improperly taken. See Eide v. Sarasota County, 908 F.2d 716, 720 (11th Cir. 1990). As the Court held in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971), a party "is entitled to recover money damages for any injuries he has suffered as a result [of a constitutional violation]." In cases involving compensation, damages are measured by comparing what the plaintiff received with what he or she would have received if there had been no violation.

Where, as here, the taking is accomplished through the imposition of a tax, the government must refund whatever has been improperly collected and stop imposing the tax. Where, as in United States v. Will, 449 U.S. 200 (1980), a portion of a judge's lawful salary is withheld, that portion wrongfully withheld must be repaid through "backpay"; and, to prevent further injury, salaries must be restored to their proper levels. In Will, the plaintiffs recovered the difference between the compensation that had been paid them and the compensation that would have been paid them but for the constitutional violations. In Year 1 (described by the government at Govt. Bf., pp. 41-42), the judges claimed that for each of the first five months of that year (October 1976 through February 1977), they received 1/12 of $42,000, whereas their lawful salary was 1/12 of $44,000, i.e., the salary they would have received if Congress had not unconstitutionally stopped payment of the COLA after it had become law.[5] In March 1977, judges' lawful pay established under the Salary Act was set at

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[5] References are to salaries of district judges.

$54,500 per annum. Will, 499 U.S. at 206. For the rest of that fiscal year, judges received the full salary to which they were entitled by law. Accordingly, there was no claim of any constitutional violation. The action complained of (the withholding of the 4.8% COLA for 1977) no longer had any effect on judges' salaries so that the payment of backpay for October 1976 through February 1977 fully satisfied plaintiffs' claims.[6]

The government glosses over the fact that the plaintiffs in Will also prevailed on a second claim; the withholding of the adjustments for fiscal 1980, referred to in the Opinion as Year 4. Will, 449 U.S. at 229-30. On remand, the plaintiffs asserted a claim for a fifth year, Year 5 (fiscal 1980). Because the circumstances in Year 5 were legally the same as Years 1 and 4, the government conceded liability and damages. The judges ultimately recovered the full amount claimed. Damages were calculated for both years based on the amounts withheld each month up to December 31, 1980, the date that new salary levels, ordered by the district court, went into effect. The new "lawful" salaries were determined by compounding the amount of the 1980 adjustment (Year 4) of 12.9% and the 1981 adjustment (Year 5) of 9.12% for a total increase of $10,983. See Will v. United States, 90 F.R.D. 336, 341 n.7 (N.D. Ill. 1981). If the government's argument that a subsequent increase cures an earlier violation were correct, the Year 5 increase would have significantly "cured" the Year 4 violation. The two adjustments would not have been compounded to establish the correct salary level and the full measure of damages. But the government's current "curing" concept was not even suggested then for the obvious reason that it would not have made the judges whole. It would not have paid them the

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[6] Their ultimate measure of damages was 5/12 of $2,000, or $833.30. See Will v. United States, 90 F.R.D. 336, 341 n.8 (N.D. Ill. 1981).

difference between what they received and what they would have received, but for the constitutional violation.

The government's "curing" theory would also undermine one of the most fundamental purposes of the Compensation Clause. Under the government's theory, Congress could do precisely what Article III, Section 1 was designed to prevent – punish the Judiciary for unpopular decisions, and then permit Congress to "cure" its unconstitutional actions by including judges in a generally applicable percentage pay increase which would have been enacted even if the unconstitutional reduction in pay had never occurred. That percentage pay increase might well bring them up to their former salary level, but it would not raise their salaries to where they otherwise would have been absent the unconstitutional reduction. The dangers inherent in the government's argument expose it for what it is – an abandonment of the fundamental protections guaranteed by Article III, Section 1. The Court of Appeals was correct to reject this argument.

CONCLUSION

The Federal Judges Association, as *Amicus Curiae*, respectfully submits that the judgment of the Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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